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RESEARCH ARTICLE

Deadlock in Rule of Law Theory and the Potential of Internal Critique

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Abstract

This article proposes that theoretical debates over the Rule of Law can be revitalised through careful focus on methodology. First, it contends that the prevalent methodology of theory-construction is a rationally reconstructive form of conceptual analysis which makes deadlock practically inescapable. The methodology requires the invocation of deeply controversial *conceptual cross-references:* to reconstruct vague intuitions about the Rule of Law, theories are compelled to invoke other concepts over which deeply engrained disagreements persist. Second, turning to the possibility of overcoming or mitigating deadlock through critical argument, it argues that the capacity of critique to pose meaningful challenges to rival theories turns on its treatment of its target's conceptual cross-references. *Dissonant critique,* which is premised on the rejection of a rival theory's defensible conceptual cross-references, is seldom productive. *Internal critique,* which proceeds from rival theories' conceptual cross-references, poses more meaningful challenges and is more philosophically productive.

Rule of Law theory is marked by deadlock: there are deeply entrenched disagreements between rival theories of the concept which seem to be irresolvable through critical debate. The debate is shaped by a divide between two broad camps.[1] Some theories are *thin*,[2] in the sense that they limit the Rule of Law to a comparatively narrow range of institutional recommendations. Thin theories restrict the scope of the Rule of Law to a relatively uncontroversial set of *core principles* pertaining to the form of law and procedures of law-making and application.[3] They typically include requirements of

[1]The camps have been labeled, variously: formal/substantive (*see, e.g.*, Paul P. Craig, *Formal and substantive conceptions of the rule of law: an analytical framework*, Public L. 467 (1997)); rule-based/rights-based (*see, e.g.*, Ronald Dworkin, A Matter of Principle (1985)); and thin/thick (*see, e.g.*, John Tasioulas, *The Rule of Law*, *in* Cambridge Companion to the Philosophy of Law 117 (John Tasioulas ed. 2020)).

[2]*See, e.g.*, Lon L. Fuller, The morality of law (rev. ed. 1969); John Rawls, A theory of justice (rev. ed. 1999); Joseph Raz, *The Rule of Law and its Virtue*, *in* The Authority of Law 210 (2nd ed. 2009).

[3]Jeremy Waldron, *The Concept and the Rule of Law*, 43 Georgia L. Rev. 1 (2008).

generality, promulgation, prospectivity, clarity, coherence, nonimpossibility, relative stability, and consistent application, including a demand for independent and accessible courts.[4] Other theories are *thick*[5] because they incorporate a wider range of institutional recommendations. Thick theories typically supplement core principles with claims that the Rule of Law requires legal systems to uphold a broad range of fundamental human rights and an expansive, substantive ideal of equality. These *supplementary principles* are what make thick theories thicker than thin theories.

This division between thin and thick theories frames prominent critical debates over the Rule of Law.[6] Thick theorists contend that thin conceptions are not "satisfactory,"[7] that thick theories are "superior,"[8] and that we should therefore "reject"[9] thin accounts. Meanwhile, thin theorists argue that thick conceptions of the Rule of Law include principles which are "not appropriately part of the ideal"[10] or are incapable of serving "any useful function."[11] Despite the prevalence of these critical confrontations, we are often left with the impression that they fail to shift the debate.

A central aim in philosophy generally—and theorizing concepts like the Rule of Law in particular—is to advance our understanding of ourselves and the world around us.[12] Deadlock might seem to suggest that we have reached the limits of what we can hope to achieve through theoretical reflection about the Rule of Law; that our understanding cannot be advanced any further. If so, engaging in further "spadework"[13] at this particular philosophical coalface may, bluntly, seem pointless. In this article, I present a more optimistic view: with the right methodological tools, there remains scope for advancing our understanding *despite* deadlock.

Deeply entrenched disagreements between thinner and thicker conceptions of the Rule of Law are oft-noted,[14] yet the precise nature and causes of deadlock are less regularly—and less deeply—interrogated.[15] This failure to examine its precise causes in turn entails that opportunities to mitigate or overcome deadlock are overlooked. My aim is to address this lacuna and revitalize a stagnant-seeming debate. I shall contend that a better understanding of the underlying methodology—both of theory-

[4]Andrei Marmor, *The Rule of Law and its Limits*, 23 Law & Phil. 1 (2004).

[5]*See, e.g.*, Dworkin *supra* note 1; Lord Bingham, *The Rule of Law*, 66 Cambridge L.J. 67 (2007); T. R. S. Allan, *The Rule of Law*, *in* Philosophical Foundations of Constitutional Law 201 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

[6]For works employing this framing *see, e.g.*, Craig, *supra* note 1; Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory 91–113 (2004); Tasioulas, *supra* note 1.

[7]Allan, *supra* note 5 at 207.

[8]Dworkin, *supra* note 1 at 18.

[9]Bingham, *supra* note 5 at 67.

[10]Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 Law & Phil. 239, 262 (2005).

[11]Raz, *supra* note 2 at 211.

[12]This view is widely shared and is reflected in the way philosophers explain their work to non–professional-philosophers. *See, e.g.*, Simon Blackburn, Think (1999).

[13]Frank Jackson, *Armchair Metaphysics Revisited: The Three Grades of Involvement in Conceptual Analysis*, *in* The Cambridge Companion to Philosophical Methodology 122, 130 (Giuseppina D'Oro & Søren Overgaard eds., 2017).

[14]*See supra*, notes 6–10.

[15]One notable exception is Waldron's argument that the Rule of Law is an "essentially contested concept"—a concept with no settled core meaning. *See* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 Law & Phil. 137 (2002). Others dispute this. *See, e.g.*, William Lucy, *Access to Justice and the Rule of Law*, 40 Oxford J. Legal Stud. 377 (2020).

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construction and critique—yields important benefits for the productivity of ongoing debates and, ultimately, for our understanding of the Rule of Law. In particular, I shall argue that the key to understanding and mitigating deadlock is a proper appreciation of both the inevitability and the impact of *conceptual cross-references*.

The first two Sections focus on the process of theory-construction—that is, the productive activity of articulating a coherent account of a concept, which culminates in conclusions like: "the Rule of Law serves the following value(s)" and "the Rule of Law requires this and that." After outlining the basic methodology in Section I, in Section II I shall argue that conceptual cross-references are a principal contributor to deadlock in Rule of Law theory. These arise when, in order to ground a theoretical argument about one concept—the Rule of Law—we must invoke a conception or theory of some other concept—law, freedom, agency, or whatever. They are not only a *necessary* feature of theory-construction; they are also inevitably *tendentious*. Properly understanding the impact of conceptual cross-references in theory-construction is beneficial in itself, since it explains deadlock. But it also has consequential benefits for theoretical critique.

Critique is a primarily destructive exercise,[16] aiming to establish that seemingly plausible—or at least widely accepted—rival theories are not just different, but mistaken. Its implicit aim is to overcome deadlock by demonstrating that one theory is superior to the alternatives. Conceptual cross-references are equally inevitable in critique, yet their impact is under-appreciated. In Section III, I shall argue that different approaches to conceptual cross-references in critique have significant ramifications for a critique's productivity: whether it meaningfully advances our understanding or serves only to reproduce deadlock. I shall contend that some approaches to critique (*dissonant critique*), which boil down to a rejection of rival theories' different, but defensible, conceptual cross-references, are generally unproductive. A more productive—but under-appreciated and under-utilized—approach (*internal critique*) self-consciously premises critical arguments on rival theories' conceptual cross-references. Since internal critique does not proceed from fundamentally different premises from its target theory, it is not bound to reproduce the deadlock which pervades theory-construction. Rigorously implemented internal critique is thus capable of posing meaningful challenges to rival theories, forcing commensurately meaningful responses, and ultimately advancing our understanding.

In Section IV, the productive potential of internal critique—and the importance of rigorously adhering to its methodological parameters—will be illustrated with a case study: T.R.S. Allan's seemingly internal critique of thin theories and an internal critique of Allan's Kantian-inspired thick theory.[17]

I. Theory-Construction

When we construct theories of the Rule of Law, what do we seek to achieve and how do we seek to achieve it? In this Section, I shall outline the methodology of theory-

[16]Critique *can* contribute to theory construction, as when theories are constructed specifically to sidestep weaknesses identified through prior critique of rivals. *See, e.g.*, Raz, *supra* note 2; N.E. Simmonds, Law as a Moral Idea (2007); Waldron, *supra* note 3; Allan, *supra* note 5.

[17]Allan, *supra* note 5.

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construction—a rich version of conceptual analysis—which implicitly[18] or explicitly underpins the theories of the Rule of Law on which I focus.

Before that, two disclaimers about claims I do *not* purport to establish. First, I shall not defend my arguments as interventions in general debates over philosophical methodology.[19] That is not to concede that my arguments are categorically *in*applicable: they may well apply to other, similarly structured philosophical debates. But for the purposes of this article, I shall adopt the prevalent methodology of Rule of Law theory *arguendo*,[20] without making more expansive claims about the right way to do philosophy in general. Second, my arguments do not necessarily generalize even to *all* theories about the Rule of Law. While it *is* crucial to my argument that a prominent subset of theories of the Rule of Law *do* ask essentially the same questions and utilize essentially the same methods, that does not entail that *every* theorist of the Rule of Law must do so. Some theories, for example, are avowedly critical, making arguments which reject the *possibility* of constraining power with legal rules.[21] Others seemingly take a more "ameliorative"[22] approach, focusing less on what the concept *is*, more on how it *should* be understood in order to promote certain goals or values.[23] Some focus on the Rule of Law as a parochial legal doctrine, theorizing the concept not as an abstract political principle but as a concrete legal standard within a specific legal system.[24] My arguments are not intended to undermine all of these different projects.[25]

Yet, while acknowledging that theoretical methodology can and does vary considerably, the most prominent thin and thick theories of the Rule of Law broadly

[18]Few theorists are explicit about their methodology, so my account derives from what is implicit in relevant theories (*see, supra*, notes 2–5). I substantiate this derivation by reference to various examples of theorists employing this approach, cited throughout this article. For a similar account, *see* Tasioulas, *supra* note 1.

[19]I shall however flag some distinctive features of this method, especially when it diverges from other forms of conceptual analysis. *See infra*, the text accompanying notes 37–46 and 100–105. Some other methodologies diverge more radically. *See, e.g.*, Brian Leiter, Naturalizing Jurisprudence (2007); Timothy Williamson, The Philosophy of Philosophy (2nd ed. 2021). But this article proceeds on the assumption that conceptual analysis is defensible.

[20]This *both* ensures that my arguments speak to the existing debate on its own terms *and* reflects some tentative reasons to think that Rule of Law theory has features which, if not necessarily unique, are certainly distinctive (*see infra*, the text accompanying notes 37–46).

[21]Allan C. Hutchinson, *The Rule of Law Revisited: Democracy and Courts*, *in* Recrafting the Rule of Law: The Limits of Legal Order 196 (David Dyzenhaus ed. 1999).

[22]Sally Haslanger, *Philosophical Analysis and Social Kinds: What Good are Our Intuitions?*, 80 Proc. Aristotelian Soc'y, Supp. Vol. 89, 95 (2006). For discussion of the relevance of the arguments presented in this paper to ameliorative methodologies, *see infra* note 105.

[23]*E.g.* a claim that the Rule of Law should serve nonhuman animals might be read this way. *See, e.g.*, John Adenitire, *The Rule of Law for All Sentient Animals*, Canadian J.L. & Juris. 1 (2022).

[24]*See, e.g.*, T.R.S. Allan's earlier writing on the UK constitution: T.R.S. Allan, Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (1993); T.R.S. Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (2001); T.R.S. Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (2013).

[25]A possible objection: since different projects produce different theories, is that not deadlock? No: there are plausibly several philosophically interesting questions about the Rule of Law, such that different projects do not *necessarily* provide incommensurable answers to the *same* question, but rationally different answers to *different* questions. This doesn't preclude criticism of any specific project, but that is a separate issue.

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share a specific approach to theory-construction.[26] They begin with a shared aim: to improve our understanding of a normative concept (the Rule of Law) which is widely employed in legal and political discourse as a standard for prescribing how systems of government ought to be arranged and for evaluating their operation in practice. Like other forms of conceptual analysis,[27] theories of the Rule of Law ultimately seek to clarify our understanding by proposing a "more fundamental vocabulary"[28] which "[breaks] the concept down into its more fundamental characteristics" to make "explicit what is tacit in ordinary usage of the term."[29] So, just as theories of law might propose that the concept of law can be broken down into more fundamental properties of commands and sovereigns, or primary and secondary rules,[30] theories of the Rule of Law seek to break the concept down into its more fundamental elements. Since the Rule of Law is a normative political concept, theories generally explain the concept in terms of two such elements: *what* the Rule of Law requires and *why*. The first element is the set of institutional requirements that must be satisfied for the Rule of Law to be upheld, and whose violation indicates a departure from the ideal. These are the long lists of core and supplementary principles that are a characteristic feature of Rule of Law theories.[31] These principles are usually understood as deriving from the second element: the value or purpose that the Rule of Law serves, which explains why the principles of the Rule of Law should be complied with.[32] Since, for most, the Rule of Law is a prescriptive and evaluative concept, a central task of Rule of Law theory is to explain "what might one want the rule of law *for*."[33] Theories thus seek to identify the purposes or values which are the ideal's "*telos*"; the values "internal to, immanent in the concept."[34]

How do theorists reach their conclusions about what the Rule of Law entails, both in terms of its specific principles and its underlying value? Their approach involves a managed interplay between central intuitions about the concept and an aspiration to coherent rationalization.[35] Theorists begin with widely held convictions about the

[26]There is sufficient common ground to sketch a shared approach: all accept the Rule of Law is a normative concept, all take its specific requirements to be sensitive to its point or value, and all take coherence to be a primary methodological concern.

[27]Despite some differences from Jackson's approach (*see infra*, notes 37–46), this remains "modest" conceptual analysis, seeking to elucidate concepts based on how they are used and the meaning we attach to them; *not* "immodest" conceptual analysis, purporting to uncover truths about the nature of the Universe. *See further*, Frank Jackson, From Metaphysics to Ethics: A Defence of Conceptual Analysis (1998). On the appropriateness of modest conceptual analysis for non-natural, hermeneutic concepts, *see*, Ian P. Farrell, *H.L.A. Hart and the Methodology of Jurisprudence*, 84 Tex. L. Rev. 983 (2005).

[28]Jackson, *supra* note 27 at 28.

[29]Farrell, *supra* note 27 at 998.

[30]*Id.*

[31]*See, e.g., supra* notes 2–5.

[32]On any account, the Rule of Law is conditionally valuable, and may even be *pro tanto* or intrinsically valuable. For thin accounts at each end of this spectrum, *see* Raz *supra* note 2 and Simmonds *supra* note 16. Thick accounts inevitably regard it as intrinsically valuable.

[33]Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares?*, 50 Nomos 64, 67 (2011) (emphasis in original).

[34]Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* Re-locating the Rule of Law 44, 47 (Gianluigi Palombella and Neil Walker eds., 2008).

[35]Coherence is just one "meta-theoretic" or "epistemic" virtue (*See, respectively*, Julie Dickson, Evaluation and Legal Theory Ch. 2 (2001); Leiter, *supra* note 19 at 167–168). Other such virtues include "simplicity, clarity, comprehensiveness, [and] explanatory consilience" (Grant Lamond, *Methodology*, *in*

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content of the concept, typically derived from usage, and proceed to articulate theoretically coherent accounts which rationalize, clarify, and elaborate upon those intuitions.[36]

While this methodology constitutes a *form* of conceptual analysis,[37] approaches to conceptual analysis vary. There are at least two features of the approach in Rule of Law theory which distinguish this methodology from more austere, purely descriptive approaches.[38] First, these theories, which aim to elucidate the Rule of Law as a normatively grounded and justified concept, embrace a normatively loaded version of conceptual analysis.[39] For Raz, theories of normative political concepts are not merely "an attempt to state the meaning of a word."[40] Instead, theorizing such concepts necessitates "interdependence between conceptual and normative argument."[41] Thus, while theories "attempt to make explicit elements of our common traditions[…]"[42] by accounting for central intuitions, they are also:

> "partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favour."[43]

Theories thus take a position on the normative underpinnings of the concept and extrapolate accordingly. Second, relatedly, Rule of Law theory fully embraces "rational reconstruction."[44] While theory-construction must show fidelity to our central intuitions, it does not purport solely to describe those intuitions. Theories aim

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The Cambridge Companion to the Philosophy of Law 17, *supra* note 1 at 25). In focusing on coherence, I don't reject the others, but they are less influential in this debate.

[36] *See, e.g., infra*, the text accompanying notes 58-64.

[37] All commit to the basic method of drawing out the nature of concepts through reflection on intuitions (*see supra* Section I.A & Jackson, *supra* note 27 at Ch. 2). As such, there is continuity between conceptual analysis, rational reconstruction, and interpretivism (Lamond, *supra* note 35). I follow Shapiro in regarding reconstructive approaches as a kind of conceptual analysis (Scott J. Shapiro, Legality 13 (2011)).

[38] *See, e.g.*, Jackson, *supra* note 27; David J. Chalmers & Frank Jackson, *Conceptual Analysis and Reductive Explanation*, 110 Phil. Rev. 315 (2001); David J. Chalmers, *Verbal Disputes*, 120 Phil. Rev. 515 (2011).

Under these accounts, conceptual analysis elucidates a descriptive theory of a concept based on one's intuitions and "to the extent that our intuitions coincide," it identifies a "shared" or "folk theory" (Jackson, *supra* note 27 at 32.). While there may be scope for minor revision of our concepts to "clear up confusions" (Chalmers and Jackson, *supra* note 38 at 323 (note 6), this version of conceptual analysis serves primarily to reveal "a set of complex descriptive facts about how and when we are disposed to apply our words." (David Plunkett, *A Positivist Route for Explaining how Facts Make Law*, 18 Legal Theory 139, 182 (2012).)

[39] This approach can be criticized (*e.g.*, Plunkett, *supra* note 38 at Section III). I shall not engage in these debates at length, since my aim is not to resolve general methodological questions.

However, it is arguable that Raz's approach is distinctively apt for analysis of *normative* concepts, especially intuitively vague ones, since providing a coherent explanation of the value of these concepts necessarily involves normative justification, and our selection of normative justification in turn has ramifications for the detail of our conception. Raz seems to justify his own "normative-explanatory" approach on this basis: some concepts (for him, political authority) are "deeply embedded in the philosophical and political traditions of our culture" and play an important normative role which requires normative explanation (Joseph Raz, The Morality of Freedom 63–65 (1986)).

[40] *Id.* at 63.

[41] *Id.* at 63.

[42] *Id.* at 63.

[43] *Id.* at 63.

[44] Lamond, *supra* note 35 at 22–26. *See further supra*, note 37.

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to rationalize the concept in accordance with the value(s) the concept is taken to instantiate. That entails possible revision, elaboration, or even abandonment of intuitions, such that theories may not "necessarily conform to everyone's notion of [a concept] in all detail."[45] There is a sense in which this approach presupposes that, once we work out what *really* normatively grounds the Rule of Law, we can more accurately specify what it *really* requires.[46]

A. Starting Points

Ordinarily, we construct theories to help improve our understanding of *existing* concepts;[47] that is, to enhance the clarity and rigor of concepts, like the Rule of Law,[48] which we already employ to describe and evaluate the world around us.

Since any approach to conceptual analysis aims at improving our understanding of existing concepts, the natural starting point is the way in which the concept is already used and understood.[49] Consequently, those engaged in conceptual analysis typically assert the importance of "respecting our intuitions"[50] about the concept under analysis. These "intuitive"[51] or "considered"[52] judgments consist of firmly held ideas about the content of the concept, typically derived from common usage.

Our intuitions about the nature of concepts frequently diverge. Some individually held intuitions will be contested, even idiosyncratic. But meaningful theoretical debate over concepts requires that the intuitions from which we construct our theories are, as far as possible, convergent—that all participants in the debate are articulating theories about essentially the same thing.[53] Put another way, it is preferable that controversial claims about concepts, including the Rule of Law, are the *outputs* not the *inputs* of conceptual analysis.[54] To the extent that analysis of a concept proceeds from controversial inputs, its conclusions can be easily dismissed as

[45]Raz, *supra* note 39 at 65.

[46]Purely descriptive approaches are more likely to embrace the possibility of a plurality of concepts associated with terms like "the Rule of Law" (*see, e.g.*, Chalmers, *supra* note 38; Jackson, *supra* note 13; David Plunkett, *Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute over Legal Positivism*, 22 Legal Theory 205 (2016)). While this type of conceptual analysis cannot *in itself* resolve deadlock, nor are its practitioners bound to embrace stalemate: they identify strategies for dealing with conceptual disputes but crucially they regard these as *distinct* from conceptual analysis. For discussion of some of these strategies, *see infra*, Sections II.C & III.A.

[47]Coinage sometimes results from conceptual analysis. For instance, Rawls' "difference principle" helps parcel-up different components revealed in his analysis of "justice" (*See* Rawls *supra* note 2 at 63–75); Hart coins the "rule of recognition" to explain previously fuzzy features of the concept of law (H. L. A. Hart, The Concept of Law 94 (3rd ed. 2012)).

[48]A concept arguably dating to Ancient Greece (Tamanaha, *supra* note 6 at 7).

[49]Jackson, *supra* note 27; Lamond, *supra* note 35 at 17–18.

[50]Christian List & Laura Valentini, *The Methodology of Political Theory*, *in* The Oxford Handbook of Philosophical Methodology 525, 533 (Herman Cappelen, et al. eds., 2016).

[51]Lamond, supra note 35 at 17–18.

[52]Rawls, *supra* note 2 at 42.

[53]Jackson, *supra* note 27 at 31. 1998; Lamond, *supra* note 35 at 19. Similarly, for Dworkin consensus about the object interpretation is essential for interpretative debates. *See* Ronald Dworkin, Law's empire 66 (Hart Publishing. 1998).

[54]Shapiro, *supra* note 37 at 13–16.

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tendentious.[55] Controversial claims are more robust when they are derived from widely shared premises. To avoid notionally rivalrous theories of the same concept taking radically different starting points, conceptual analyses should proceed from a set of *central* intuitions about the concept under analysis. These are what Scott Shapiro labels "truisms":[56] "truths that those who have a good understanding of [the concept] take to be self-evident, or at least would take to be so on due reflection."[57]

It is vital, therefore, to identify intuitions which are reliable starting points for constructing theories of the Rule of Law. I shall suggest a few examples, all of which are widely invoked and utilized as analytical starting points in the theoretical literature. For one, it is a matter of broad consensus that the Rule of Law *is* or *can be* valuable.[58] Next, although it is a property of political systems in the round, the Rule of Law has a special connection to law and legal systems.[59] Other sound analytical starting points include three core themes which, for Brian Tamanaha, persist throughout the long history of Rule of Law theory.[60] These are, first, the idea of "government limited by law."[61] Second, a preference for government through "the rule of law, not man."[62] And, third: "formal legality,"[63] that is, a demand for compliance with core Rule of Law principles—publicity, nonretroactivity, consistent application, and the like.

These are the kinds of truisms that are likely to constitute any "folk theory" of the Rule of Law.[64] Equally, they are the central intuitions we must "respect"[65] and adopt as starting points in theory-construction. But how exactly should we use them?

B. Coherent Rationalization

Theories of the Rule of Law are not mere reportage of central intuitions.[66] Rather, while exhibiting broad correspondence with those intuitions, theories aim principally at *coherent rationalization*. A theory that spurns too many central intuitions is implausible. Yet, while respect for central intuitions is important, it is not absolute. Our starting points are expressly *provisional*: many, perhaps most, do not operate as an automatic veto over theories which spurn them.[67] Our intuitions are instead

[55]An easily rebutted argument from *non*-central intuitions is Bingham's claim that human rights violations are *ipso facto* Rule of Law of violations, or else we would "strip the [concept] of much of its virtue" (Bingham, *supra* note 5 at 67.). This argument is "question-begging," since it is premised on the controversial assumption that the concept *must hold* the value it *would hold*, if it included human rights (*see* John Gardner, *How to be a Good Judge (Review of Tom Bingham, The Rule of Law (Allen Lane 2010))*, 32 London Review of Books (2010)).

[56]Shapiro, *supra* note 37 at 13.

[57]*Id.* at 15.

[58]*See, e.g., supra*, note 32.

[59]*See, e.g., infra*, Section II.A.

[60]Tamanaha, *supra* note 6 at 114–126.

[61]*Id.* at 114–119.

[62]*Id.* at 122–126.

[63]*Id.* at 119–122. *See further infra*, Section II.B.

[64]Jackson, *supra* note 27 at 32.

[65]List & Valentini, *supra* note 50 at 533. 2016.

[66]The purely descriptive approach (*see supra*, note 38) comes closer to this, but even that allows for minor revision.

[67]For reasons not to regard intuitions as "strict evidence" *see*, List and Valentini, *supra* note 50 at 541.

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subject to revision in light of theoretical reflection. Assuming sufficient justification, they can be revised or discarded.[68]

Justification for amending, discarding, or extending an intuition typically derives from another vital methodological goal, namely, theoretical coherence.[69] A coherent theory of the Rule of Law is one in which *both* the value or point the concept is claimed to serve *and* all the specific principles that concretize that value or point in practice are consistent with one another and mutually reinforcing. All principles must be compatible with all other principles, all underlying values must be compatible with any other underlying values, and the full set of principles must be compatible with the full set of underlying values. While specific principles and values should accord with central intuitions as far as possible, intuitive starting points which cannot be coherently accommodated—perhaps because they are mutually incompatible—should be amended or jettisoned.

More specifically, coherence imposes two main demands. First, theories should aim to secure coherence in the sense of *internal connection*. The various claims made by a theory should tesselate; it should be possible to explain how the distinct elements of the concept relate. For Tasioulas, coherence entails that the specific principles endorsed by a theory: "must be the expression of an underlying ethical concern or coherent set of concerns and not simply an arbitrarily assembled set of desiderata."[70] For Krygier, similarly, specific principles *concretize* our understanding of what the value(s) require in practice.[71] This derivation ensures both the internal connection of the specific principles, necessarily connected by their mutual derivation from a coherent set of values, and internal connection between the value(s) underpinning the Rule of Law and its specific principles. Accordingly, we should—bluntly—reject theories which consist of lists of unconnected things a theorist takes to be valuable.

Second, theories should generally seek coherence in the sense of *deductive closure*.[72] Not only should the Rule of Law include *only* specific principles derived from its underlying value(s), but it should, all else being equal, include *all* the specific principles entailed by that value(s). For this reason, coherence often requires extrapolation beyond the content of our intuitions. To illustrate, suppose a theory grounds the Rule of Law in Value A. Suppose, additionally, that Principles X, Y, and Z flow logically from Value A, in the sense that when Principles X, Y, and Z are instantiated, Value A is secured. If this theory endorses only Principles X and Y as part of the Rule of Law—*not* Principle Z—it is, all else being equal, deficient for failing to follow its premises to deductive closure. Of course, sometimes all else is not equal. For example, we might justify excluding Principle Z if its inclusion would be radically counterintuitive, perhaps taking us beyond the intuitively appropriate "domain of application"[73] of the concept. If Principle Z relates not to systems of government, but family life or board games, then we can justify its exclusion.

[68]This process echoes Rawls's "reflective equilibrium" (Rawls, *supra* note 2 at 15–19.)

[69]Tasioulas *supra* note 1.

[70]*Id.* at 119.

[71]Krygier, *supra* note 34 at 47.

[72]List and Valentini, *supra* note 50 at 539. For examples of this approach in Rule of Law theory, *see* Raz, *supra* note 2 at 214, where the proposed principles of the Rule of Law are stated to be an *inexhaustive* list of entailments from the concept's value/point. *See, also*, Allan, *supra* note 5, and the discussion of Allan's reliance on the principle of deductive closure *infra*, Section IV.

[73]List and Valentini, *supra* note 50 at 531.

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Conceptual analysis thus mediates between central intuitions and the requirement of coherent rationalization. Intuitions are both starting points and constraints on the conclusions that may plausibly be drawn, since even coherent theories may egregiously transgress our intuitions such that they must be rejected. At the same time, coherence will sometimes require modest departures from these starting points. Our theories might discard, revise, or extend our intuitions when necessary.

II. Conceptual Cross-References

This outline of conceptual analysis presents a straightforward-seeming picture: we begin with central intuitions about some concept, add a strong dose of theoretical rigor, and the result is a coherent and plausible theory. But things are rarely so straightforward, as is evident from the seemingly intractable disagreements that arise over theories of the Rule of Law. In this Section, I shall explain why theory-construction frequently—perhaps inevitably—results in deadlock.

Differences between theories generally result from *divergent rationalization.* It is often possible to draw coherent, yet divergent, theoretical conclusions from the same central intuitions. Since these disagreements can arise despite a broadly shared methodology and absent of clear analytical error,[74] they are resistant to analytical resolution. Hence: deadlock.

Divergent rationalization has two interconnected causes. The first—more obvious—cause is the indeterminacy of our starting points. Many of the central intuitions from which theories seek to extrapolate are marked by a degree of vagueness, such that they cannot yield any uniquely correct interpretation. Take the intuitions that the Rule of Law is, variously: opposed to the Rule of Men, in favor of government under law, hostile to arbitrary power, and closely connected with the essential properties of a legal system. While none of these intuitions is so vague as to admit entirely unconstrained interpretation—understanding the Rule of Law as compatible with *ad hoc* commands of a tyrant is categorically ruled out by each—all do admit a range of plausible interpretations.[75] And although some central intuitions are relatively concrete—the requirements of formal legality, for example—even these more concrete starting points can be differently interpreted. The methodology outlined above requires that theorists render more determinate these vague starting points, but that creates inevitable scope for divergence.

The second—less obvious—cause of deadlock is a method routinely employed to render indeterminate intuitions more determinate: the invocation of *conceptual cross-references.* Conceptual cross-references occur in theory-construction when, in order to rationalize central intuitions about one concept—concept X—we invoke a fully formed theory of some other concept—concept Y. Once alert to this phenomenon, we find that Rule of Law theory is pervaded by conceptual cross-references. Sometimes they are required because central intuitions explicitly invoke a separate concept, as with the intuition that the Rule of Law has a special connection to the concept of law. But even when separate concepts are not explicitly cross-

[74]Analytical errors result from deviation from methodological requirements, such as constructing theories from noncentral intuitions or rationalizing incoherently. While *disagreements* can result from analytical error, there is no *deadlock* because erroneous arguments can be persuasively rejected. *See, e.g., supra* note 55.

[75]For an illustration focusing on the intuition that the Rule of Law contrasts with the Rule of Men, *see* Waldron, *supra* note 15 at 155–157.

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referenced in our intuitions, conceptual cross-references may be necessary for their explication. For example, the intuition that the core principles which constitute formal legality are part of the Rule of Law implicitly requires reference to political theoretical concepts capable of explaining a point or value that those principles collectively and coherently serve.

Conceptual cross-references are a principal contributor to deadlock. Even when the intuitions which necessitate conceptual cross-references are relatively uncontroversial, there is frequently entrenched disagreement over conceptual cross-references: sometimes over *which concepts* should be cross-referenced to rationalize our intuitions; sometimes over *which conception* of a particular concept should be preferred. And when conceptual cross-references diverge, conceptions of the Rule of Law generally diverge in turn. Most importantly, disagreements that result from conceptual cross-references cannot be resolved within the parameters of conceptual analysis of the Rule of Law, because our understandings of these concepts are essentially imported, fully formed. And, given the entrenched nature of disagreements over cross-referenced concepts themselves, the prospect of resolving those disagreements by refocusing on debates over the imported concepts is remote.[76] The inevitable practical ramification is deadlock.

While conceptual cross-references are usually acknowledged, their controversiality and impact on debates over the Rule of Law are under-appreciated. To illustrate, let's look at a couple of examples.

A. The Concept and the Rule of Law

A common argument in Rule of Law theory begins with the uncontroversial observation that the Rule of Law is connected to the concept of law. However, from this central intuition, theorists extrapolate radically different theories. For some, one's conception of the Rule of Law flows more or less automatically from one's conception of law,[77] resulting in the following form of argument:

1. The Rule of Law is the proper instantiation of law.
2. Law is *Y*.
3. Therefore, the Rule of Law requires the proper instantiation of *Y*.

At stage 2, this argument necessarily invokes a cross-reference to one or other conception of the concept of law.

We find several versions of this argument in the literature, on both sides of the thin/thick divide. For Ronald Dworkin, thin, "rule-book" conceptions of the Rule of Law derive from an impoverished positivist conception of law,[78] whereas the merits of a thicker "rights" conception of the Rule of Law become apparent once we accept a

[76] *See further infra*, Section III.A.

[77] The nature of the connection between law and the Rule of Law is itself vague and divergently interpreted. For some, the Rule of Law corresponds to a *subset* of the characteristics of a properly functioning legal system (*see, e.g.*, John Finnis, Natural Law and Natural Rights 270–273 (2nd ed. 2011)). For others it extends *beyond* the essential characteristics of law (*see, e.g.*, Vincent Chiao, *Hyperlexis and the Rule of Law*, 27 Legal Theory 126 (2021)). Some eschew the connection to jurisprudential theories, positing that the concept instead reflects a "lay" conception (*see, e.g.*, Raz, *supra* note 2 at 213).

[78] I.e. Hart, *supra* note 47 and those who follow in the Hartian positivist tradition.

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superior, nonpositivist conception of law.[79] Thin theories sometimes adopt a similar logic.[80] Shapiro, for example, proposes a positivist conception of law as "an activity of social planning."[81] With this theory of law in hand, he straightforwardly concludes that "the Rule of Law [...] is the Rule of Social Planning: its value derives entirely from the benefits that social planning generates."[82]

These arguments build upon a central intuition and the extrapolations seem analytically sound. Yet the resulting conceptions of the Rule of Law are premised on controversial conceptual cross-references which, on the face of it, cause deadlock. That a legal positivist can plausibly extrapolate a thin conception of the Rule of Law from their conception of law establishes nothing, by itself, about the plausibility of a thick theory premised on a different, nonpositivist jurisprudential theory. The resulting disagreement cannot be overcome within the parameters of conceptual analysis of the Rule of Law, since it stems not from an unsustainable intuition or an analytical error in rationalization, but from deep-rooted disagreements about another concept altogether. Contested outputs from theories about the nature of law are reframed as inputs to theories of the Rule of Law, and debates over the Rule of Law conducted in these terms therefore cash out as proxy battles in the wider disputes of general jurisprudence.[83]

B. Extrapolating from the Core

Another central intuition holds that the Rule of Law must include requirements of "formal legality":[84] the core principles of generality, promulgation, nonretroactivity, clarity, consistent application, and so on. This intuition specifies both a fairly detailed set of practical requirements and the essential point of these practical requirements: providing certainty, predictability, and reliable expectations to law's subjects. Both thin and thick theories treat these ideas as analytical starting points and justify their conceptions of the Rule of Law as coherent rationalizations of or extrapolations therefrom.

For proponents of thin conceptions, knowing where one stands, in relation to state power, other individuals, or both, is *the* distinctive point or value of the Rule of Law. For Hayek, core principles ensure there are "rules which make it possible to foresee with fair certainty how [government] will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[85] For Fuller, in law-making, "Government says to the citizen in effect, 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to our conduct.'"[86] For Raz, "violation of the rule of law can take two forms. It may lead to uncertainty or it may lead to frustrated and

[79]Dworkin, *supra* note 1 at 11.

[80]Allan, *supra* note 5 at 201.

[81]Shapiro, *supra* note 37 at 195.

[82]*Id.* at 396. *See, similarly*, Fuller *supra* note 2.

[83]An obvious response is to re-direct our attention to resolving the underlying jurisprudential debates. *See infra*, Section III.A, for discussion of why that approach is unlikely to succeed.

[84]Tamanaha, *supra* note 6 at 119–122.

[85]Friedrich Hayek, The Road to Serfdom 54 (Routledge, 1944).

[86]Fuller, *supra* note 2 at 39–40.

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disappointed expectations."[87] For Rawls, the Rule of Law requires a system of legal rules that "establish a basis for legitimate expectations."[88] Typically, this value is conceived as a discrete element of individual dignity,[89] agency,[90] or freedom,[91] often within a broadly value-pluralist political theory.[92] For thin theorists, there is a distinct point or value to certainty and predictability, and core principles exhaust the practical requirements for a system of government to create and maintain certain and predictable expectations among its subjects. Because knowing where one stands is perfectly compatible with being badly or unequally treated,[93] there is no scope for justifying the inclusion of supplementary principles like respect for human rights.

Meanwhile, proponents of thicker theories sometimes contend that the point of core principles can only be properly understood by reference to values which equally justify supplementary principles such as nondiscrimination and human rights. An example, discussed in detail later,[94] is T.R.S. Allan's argument that core principles—and the measure of certainty and predictability they establish—are just one element of a rich understanding of freedom which also requires nondiscrimination and protection of fundamental rights.[95] For Allan, supplementary principles are not merely *connected* to core principles as distinct aspects of a just political system, but are logically *entailed* by the value that underpins core principles. Deductive closure thus requires that, if we take formal legality as our starting point, supplementary principles must be recognized as requirements of the Rule of Law alongside core principles.

As with arguments premised on the intuition that the Rule of Law is connected to law, theories starting from the intuition that the Rule of Law is committed to formal legality are inevitably shaped by controversial conceptual cross-references. Thin theories are premised on narrower political theoretical concept(ion)s of freedom, dignity, and so on, which hold that the certainty and predictability which core principles secure has a distinctive point or value. Thick theories often invoke broader, less pluralist, political theoretical concepts to rationalize the same intuitions. Rivals each seem to propose internally coherent extrapolations, but their incompatible conceptual cross-references entail deadlock.

C. The Impact of Conceptual Cross References

While conceptual cross-references are rarely disguised,[96] their implications for theoretical debates over the Rule of Law are more opaque.

[87] Raz, *supra* note 2 at 222.

[88] Rawls, *supra* note 2 at 207.

[89] Raz, *supra* note 2.

[90] Fuller, *supra* note 2; Waldron, *supra* note 3 at 59–60.

[91] Hayek, *supra* note 85.

[92] Raz, *supra* note 2.

[93] This doesn't entail that *all* forms of ill-treatment are compatible with thin theories: extra-judicial or retroactive punishment, for example, inherently contravenes core principles (*see, e.g.*, Murphy, *supra* note 10; Simmonds, *supra* note 16).

[94] *See infra*, Section IV.

[95] Allan, *supra* note 5.

[96] There *is* sometimes scope to clarify exactly what concept or conception is being invoked. *See, e.g., infra*, the text accompanying notes 168–177.

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Conceptual cross-references cause deadlock for two, connected reasons. First, they are unavoidable. Without conceptual cross-references, rational reconstruction in conceptual analysis cannot get off the ground: we cannot hope to explain the intuition that the Rule of Law is fundamentally connected to law without a reference to some conception of law. Nor can a theory explain or extrapolate from the point or value of core principles without invoking concepts capable of explaining that point or value. To rationalize indeterminate intuitions, we must invoke concepts which supply the determinacy required to extrapolate a theory.

Second, the indeterminacy of our starting points often entails that more than one concept or conception can be defensibly cross-referenced. We might agree that cross-referencing the concept of law is essential, but our intuitions do not in themselves point to the relevance or correctness of any particular conception of law: lay or jurisprudential; positivist or nonpositivist. These differences in conceptual cross-references lead to practically irresolvable differences between theories of the Rule of Law.

It might be objected that deadlock is only apparent: all we need to do is ensure that we cross-reference the *correct* concepts. On this view, deadlock between theories of the Rule of Law premised on rival theories of law could be overcome by revisiting longstanding jurisprudential debates and ensuring we cross-reference the best theory of law. Resolve antecedent conceptual disputes in jurisprudence or political theory and—*ta-da*—apparently deadlocked debates over the Rule of Law can be easily settled. However, while this might seem an easy solution, theoretical debates over the antecedent concepts are themselves frequently deadlocked, such that there is no realistic prospect of identifying the *correct* conceptual cross-references.[97]

The conclusion of this Section—that deadlock in Rule of Law theory is inevitable—might seem bleak. But there are at least two important benefits to this improved understanding of the influence and ramifications of conceptual cross-references in theory-construction. First, it yields intrinsic benefits for our understanding of debates over the Rule of Law. Once the prevalence and impact of conceptual cross-references are fully appreciated, it becomes clear that theoretical claims about the Rule of Law are best understood, and should be framed,[98] in a hypothetical or conditional form: if *X*, then *Y*. For instance, *if* we accept Dworkin's nonpositivist conception of law, *then* we should adopt a thick conception of the Rule of Law. *If* Shapiro's planning theory is correct, *then* we should adopt a thin theory. Rival theories are thus re-framed as presenting conclusions which hold true, given specific background assumptions about the nature of law, political morality, and so on. In so doing, we may not get any closer to settling our primary question—"what is the Rule of Law?"—but we should better understand the issues upon which that question turns.[99] We can thus

[97]*See further infra*, Section III.A.

[98]For a good example of a transparently conditional argument, *see* Philip Sales & Frederick Wilmot-Smith, *Justice for foxes*, 138 Law Q. Rev. 583 (2023). They contend that *if* political morality is value-pluralist, *then* several conclusions about judicial function follow.

[99]There are parallels with the "method of elimination" (*see* Chalmers, *supra* note 38 at 526). When faced with a potentially verbal dispute over a term such as "the Rule of Law," one "eliminates the key term" and attempts to re-state the debate using other terms (*id.* at 526–527). This re-statement will often (not always) reveal underlying disputes over what I have termed conceptual cross-references. Elimination, like my elucidation of the impact of conceptual cross-references in this Section, "almost always yields clarification

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explain why rival theorists so frequently seem to be engaged in irresolvable disagreements. That constitutes philosophical progress.

Second, a rigorous understanding of the mechanics of theory-construction and the causes of deadlock can also help us in identifying and pursuing strategies for addressing deadlock. For example, faced with apparent deadlock, we might embrace conceptual pluralism: perhaps we should accept there are "a modest number of equally viable [conceptions], each serving a different worthwhile purpose."[100] Alternatively, we might do better to shift (or explicitly embrace[101]) an "ameliorative,"[102] "conceptual engineering,"[103] or "conceptual ethics"[104] approach, under which our question is how we *should* understand the term "the Rule of Law," in light of the uses we have for it and the aims or values we want it to secure. I shall leave these possibilities, which involve resigning to the inevitability of deadlock and/or significantly departing from the existing methodological framework, to one side.[105] Instead, I shall focus on how insights about theory-construction can improve the productivity of critique *within* the prevalent methodological framework. I shall argue that understanding the nature and impact of conceptual cross-references helps us, first, to identify and avoid critical strategies which are destined to fruitlessly reproduce deadlock and, second, to identify and rigorously pursue critical approaches which avoid those frustrations.

III. Critique

Critical arguments are typically advanced when there are two or more rival theories of a concept, each of which is taken by some to be correct, or at least plausible. Critique aims to address deadlock by showing that rival theories are flawed, such that they should be rejected or modified. The productivity of critique turns on its contribution to our understanding: it must add something that is not already clear (or which should be clear) in theory-construction. Productive contributions vary in scope and impact, but a useful heuristic is that a productive contribution generally requires a meaningful response, in the sense that proponents of the target theory cannot respond by alleging the critic has missed the point or changed the subject, but instead need to abandon, revise, or provide additional argument for the original theory. Although critique often constitutes debates between rival theorists, its productivity

of the original dispute" (*id.* at 534), since it "leaves us with a clearer understanding of the fundamental issues" (*id.* at 564). Chalmers claims this strategy can help resolve *some* disputes. *See further infra*, Section III.A.

[100]Jackson, *supra* note 13 at 132.

[101]Plunkett, *supra* note 46.

[102]Haslanger, *supra* note 22 at 95.

[103]Herman Cappelen, Fixing Language: An Essay on Conceptual Engineering (2018).

[104]Alexis Burgess and David Plunkett, *Conceptual Ethics I*, 8 Phil. Compass 1091 (2013).

[105]This reflects my adherence, *arguendo*, to the existing framework. That said, I think it's likely that my arguments below about the productivity of different types of critique would translate to other methods. For example, assuming that "paradigmatically "theoretical" considerations" are relevant in conceptual ethics (*id.* at 1094), my claims about internal critique's capacity to challenge the coherence of rival theories will be *pro tanto* relevant. My basic points about dissonant critique's essential *redundancy* should also survive this move. The main difference, if we embrace conceptual ethics, is that a far wider range of "goods and goals" are likely to be relevant (Alexis Burgess and David Plunkett, *Conceptual Ethics II*, 8 Phil. Compass 1102, 1104 (2013)).

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does not depend on whether it in fact persuades its rivals[106] (sometimes we are just stubborn!) but on whether it poses a challenge, reveals alternative ways of thinking, and necessitates a substantive response.

My argument is that some methodologies of critique have greater potential for advancing our understanding—and overcoming or mitigating deadlock—than others. Specifically, the capacity for critique to overcome rather than merely reproduce deadlock frequently turns on the way it engages with a rival theory's conceptual cross-references.

Critical arguments, like argument theory-construction, necessarily invoke conceptual cross-references, implicitly or explicitly. But different methodologies of critique interact with rival theories' conceptual cross-references in different ways. *Dissonant critique* premises critical arguments on conceptual cross-references which differ from those invoked by the target theory, contending expressly or implicitly that those adopted by the target theory are mistaken. *Internal critique*, by contrast, accepts a rival theory's conceptual cross-references, *arguendo*, with critical argument focusing on the core methodological demands of theory-construction: coherent rationalization of central intuitions. While critical arguments are not generally expressed in these terms, they typically boil down to one of these approaches.

I shall argue that internal critique has greater productive potential than dissonant critique. It is capable of fulfilling the fundamental goal of critique, namely, raising meaningful challenges to rival theories which, in turn, advance our understanding in some way. This Section and the next thus serve two important purposes. First, by articulating this under-appreciated distinction between dissonant and internal critique, they shed new light on existing debates. Second, by establishing the comparative productivity of internal critique, they point the way to maximizing the productivity of ongoing critical debates, despite deadlock.

A. Dissonant Critique

Dissonant critique explicitly or implicitly targets a theory's selection of conceptual cross-references. It contends, in effect, that a rival theory is mistaken not because it lacks coherence or because it proceeds from noncentral intuitions, but because it is premised on cross-references to concept(ion)s which are themselves mistaken. Since antecedent disagreements over conceptual cross-references are a common reason for disagreements over consequent conceptions of the Rule of Law, dissonant critique may seem the obvious means for resolving deadlock. But I shall argue that dissonant critique is generally unproductive in this regard: it reproduces deadlock-inducing aspects of theory-construction and therefore fails significantly to advance our understanding.

Dissonant critique takes different forms. First, it might contend that a theory's *selection of concept* is mistaken. For example, when it is contended that a thick theory wrongly explains central intuitions through a cross-reference to an unsustainable monist conception of justice rather than a more pluralist conception of dignity.[107]

[106]Since it poses challenges which cannot be dismissed out of hand, it seems *plausible* that productive critique has more persuasive potential. But this hunch isn't important for my argument.

[107]*See, e.g.*, Raz, *supra* note 2 at 221–222. Others contend that narrower concepts of dignity or freedom are *too narrow*, and the Rule of Law should be understood by reference to broader conceptions of justice (*see* Bingham, *supra* note 5) or freedom (*see* Allan, *supra* note 5).

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Second, critique might endorse a rival theory's selection of concept, but dispute its *selection of conception*. For example, the necessity of cross-referencing the concept of law might be common ground, but critique might allege that a rival theory is undermined by cross-referencing a mistaken conception.[108] Either way, dissonant critique rests on the claim that a theory is defective because one of its conceptual cross-references is mistaken.

The effect of dissonant critique is to shift our critical attention *from* debates over (consequent) conceptions of the Rule of Law *to* (antecedent) debates over and between cross-referenced concepts.[109] Thus, when it is argued that a thin theory of the Rule of Law is mistaken because it flows from an implausible positivist conception of law,[110] the pertinent debate does not concern the Rule of Law *per se*, but the plausibility of legal positivism. There are parallels with elements of what David Chalmers calls the "method of elimination."[111] For Chalmers, when elimination reveals that disagreements over a term like "the Rule of Law" boil down to more fundamental disputes, expressly re-focusing on those disputes may, sometimes, result in "significant philosophical progress."[112] Indeed, this may explain the attraction of dissonant critique to those who employ it reflectingly. However, while the shift in focus implicit in dissonant critique may seem an *ideal* route to resolving disputes over the Rule of Law, in many cases—including this one—it will not do so in *practice*. Indeed, Chalmers acknowledges that shifting focus will often not be "a silver bullet for solving philosophical problems."[113]

In the context of debates over the Rule of Law, dissonant critique fails to contribute significantly to our understanding because it relies on the possibility of drawing firm conclusions from antecedent conceptual debates—about the correctness of rival theories of law, freedom, justice, etc.—which those debates cannot yield. The antecedent conceptual disagreements are themselves deeply entrenched,[114] such that shifting focus will rarely establish the claim that dissonant critique relies on: that a concept(ion) cross-referenced in a rival theory is manifestly mistaken. Although those advancing dissonant critiques will implicitly rely on or explicitly advance arguments to that effect, those targeted by these critiques usually have plausible responses. So, while those who would reject a thin theory premised on a cross-reference to legal positivism will generally have arguments for rejecting legal

[108] *See, e.g.*, Dworkin, *supra* note 1; Waldron, *supra* note 3.

[109] This may be slightly over-simplified. First, Rule of Law theories may triangulate more than one conceptual cross-reference. Second, if one thinks concepts exist in "a linked web" and not an "asymmetrical structure" where some concepts are more fundamental (*see* Chalmers, *supra* note 38 at 548), debates over cross-referenced concepts may be influenced by one's theory of the Rule of Law. *E.g.*, Waldron criticizes "casual" positivist theories of law for overlooking participatory features of the legal process, partly on grounds that these are requirements of the Rule of Law. (Waldron, *supra* note 3).

[110] Dworkin, *supra* note 1.

[111] Chalmers, *supra* note 38 at 526. *See supra*, note 99 for an overview.

[112] *Id.* at 534.

[113] This doesn't undermine elimination's capacity for clarification; itself a modest "form of philosophical progress" (*id.* at 552). The more contentious question is what we do next.

[114] In jurisprudence, deadlock may be reflected in (some) theorists' recognition that (some) theoretical differences result more from different emphases than (in)correctness. *See, e.g.*, John Gardner, *Nearly Natural Law*, 52 Am. J. Juris. 1 (2007); John Finnis, *The Truth in Legal Positivism*, *in* Philosophy of Law: Collected Essays Volume IV 174 (2011).

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positivism,[115] legal positivists will typically respond with reasonable arguments that legal positivism is not only plausible but superior to the alternatives.[116] The essential problem with dissonant critique is that one deadlocked debate cannot be settled by reference to a more fundamental deadlocked debate. Unless entrenched antecedent debates can be decisively settled, shifting focus cannot advance debates over the Rule of Law.

For this reason, dissonant critique rarely adds much, if anything, to what is already latent in theory-construction, especially when our theoretical conclusions are properly understood as conditional.[117] To illustrate: to the conditional theoretical conclusion "if we adopt *this* concept/conception of law (or freedom, justice, etc.), then we should adopt *this* conception of the Rule of Law," dissonant critique merely adds the obvious (and still conditional) critical addendum: "if that conceptual cross-reference is uniquely correct, any theory premised on another conceptual cross-reference is mistaken." Since more than one conceptual cross-reference can usually be plausibly defended, and since Rule of Law theorists generally invoke plausibly defensible conceptual cross-references, dissonant critique will frequently boil down to the observation that differences in conceptual cross-references result in differences between theories. But we don't need dissonant critique to make that observation.

While dissonant critique will generally fail to contribute to our understanding in accordance with its stated aim, it is not necessarily devoid of insight, notwithstanding that any such insight tends to be obscured by its overreaching framing. Take a simple example of dissonant critique: "Theory A, derived from Conception X, is mistaken because its conclusions do not accurately extrapolate from Conception Y, unlike Theory B." Assuming this critique cannot deliver on its *stated* aim of establishing the unsustainability of Theory A for the reasons outlined above, it may nevertheless make more modest, implicit contributions. First, dissonant critique, especially once we understand its essential conditionality, contains important explanations of how and especially why different theories differ. Second, it might contribute circuitously to justifying conclusions in theory-construction. Even if the argument that Theory A would have been Theory B had it embraced Conception Y not Conception X is ineffective *qua* critique, it may help explain why one who *does* embrace Conception Y regards themselves as precluded from endorsing Theory A and bound to adopt Theory B. Third, sometimes it will be initially unclear whether Theory A cross-references Conception X or Conception Y. In that case, a critique which *turns out* to be dissonant may contribute to our understanding by prompting clarification of Theory A. When there is uncertainty about the content of a theory's conceptual cross-references,[118] or they lack adequate justification, a critique like this one might provoke proponents of Theory A into responding that the critique, premised on Conception Y, is misguided because Theory A is actually premised on Conception X.[119] While that entails the original critique is dissonant, it nevertheless contributes to our understanding by prompting an important clarification.

[115]Dworkin, *supra* note 1.

[116]For instance, Shapiro *first* defends legal positivism against Dworkin's criticisms, *then* proposes a thin theory of the Rule of Law (Shapiro, *supra* note 37).

[117]*See supra*, Section II.C.

[118]*See, e.g., infra*, the text accompanying notes 168–177.

[119]If this response is impossible, the critique will be internal.

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However, while dissonant critique may contribute to our understand in these latent, collateral ways, there are two important caveats. First, it virtually[120] always fails to contribute what it claims: to reveal flaws in rival theories necessitating revision or abandonment. Second, relatedly, the prevalent *framing* of dissonant critique is counter-productive, insofar as it obscures these latent contributions. Like a parlor game in which participants construct English sentences using German grammatical rules ("I have my steak enjoyed"), the misleading framing is obfuscatory. Any collateral insights will be more effective if dissonant critique is re-framed in terms which reflect the modest contributions it *does* make, rather than the more radical claims it *cannot* substantiate.

B. Internal Critique

While dissonant critique seems destined to reproduce the intractable disagreements over conceptual cross-references which result in deadlock, there are alternative forms of critique which do not. Internal critique is distinctively "internal" because it adopts, *arguendo*, the fundamental premises of its target—including that theory's conceptual cross-references. Rather than fruitlessly targeting a theory's controversial—yet defensible—selection of conceptual cross-references, internal critique accepts those premises and targets a theory on its own terms, focusing on its accommodation of central intuitions and the coherence of its rationalization.

There is resemblance between this methodology and the "immanent critique" associated especially with Hegel, Marx, and others who follow in the "critical" tradition.[121] Put simply, immanent critique seeks to expose existing social orders or ideologies as incoherent; as failing to adhere to their own (internal) standards.[122] Structurally, internal critique is similar: we aim to criticize an object not on the basis of "'external' normative standards,"[123] but based on standards accepted by or latent in the target of the critique.

Moreover, internal critique shares the commonly touted advantages of immanent critique. For James Gordon Finlayson, immanent critique is widely regarded as: "first, meaningful, contentful, relevant, or applicable; second, persuasive, credible, and convincing; and third, effective, practical, or useful."[124] The first, so-called "cognitive and epistemic"[125] advantages resonate with my arguments for pursuing internal

[120]Rarely, a conceptual cross-reference might be emphatically discredited. Hypothetically, take Raz's cross-reference to the "lay" conception of law shared by ordinary people, under which "law is essentially a set of open, general, and relatively stable laws" (Raz, *supra* note 2 at 213). Now suppose that work in experimental philosophy establishes that Raz's claims about the "lay" conception are categorically mistaken: perhaps ordinary people are natural lawyers, or regard law as essentially coercive. If so, those elements of Raz's theory derived from this conceptual cross-reference may be imperiled by dissonant critique. For some discussion of relevant empirical work, *see* Lucas Miotto, et al., *Law, Coercion and Folk Intuitions*, 43 Oxford J. Legal Stud. 97 (2023).

[121]*See, e.g.*, Robert J. Antonio, *Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought*, 32 British J. Socio. 330 (1981).

[122]Finlayson labels this the "commonplace" view of immanent critique (James Gordon Finlayson, *Hegel, Adorno and the Origins of Immanent Criticism*, 22 British J. Hist. Phil. 1142 (2014)) and claims it traces back to Socrates, citing Raymond Geuss, Morality, Culture, and History (1999) in support.

[123]Rachel Fraser, *The Limits of Immanent Critique*, 123 Proc. Aristotelian Soc'y. 97, 100 (2023).

[124]Finlayson, *supra* note 122 at 1145.

[125]*Id.* at 1145.

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critique in debates over the Rule of Law: namely, that it genuinely challenges the cogency of its target and forces meaningful responses. These advantages of immanent critique can be contrasted with corresponding disadvantages of dissonant (or "transcendent") criticism, which are, starkly: "meaningless or empty; irrelevant, inapplicable."[126]

Should we worry that internal critique in this context is equally susceptible to the supposed defects of immanent critique, *qua* social critique? For example, Rachel Fraser contends that the internality of immanent social critique cannot be maintained while ensuring genuine critical bite, since any useful standard of criticism ultimately must be imported, not "contained within"[127] society.[128] Fortunately, this and other concerns[129] with immanent *social* critique do not apply to internal critique of Rule of Law *theories*. While the pertinent standards might *seem* external insofar as they are derived from freestanding accounts of law, justice, or philosophical methodology, they are *rendered internal* to specific theories of the Rule of Law when they are invoked by theorists in theory-construction. Unlike societies, theorists can incorporate normative standards, expressly or by necessary implication, to which their theories can reasonably be held. These differences not only demonstrate the *prima facie* viability of internal critique in debates over the Rule of Law but also show it to be operationally, if not structurally, distinct from other prominent versions of immanent critique.

In Rule of Law theory, internal critique can take different forms. Where a theory relies on several conceptual cross-references—a conception of law as well as a conception of human dignity, say—one might internally critique that theory on grounds that the various conceptual cross-references are mutually incompatible. Such critique, although it *relates* to conceptual cross-references, remains internal insofar as it assumes the plausibility of the cross-referenced concepts individually while challenging the coherence of invoking them simultaneously.

Another form of internal critique, highlighted in Section IV's case study, problematizes a theory's extrapolation from cross-referenced concepts. This kind of critique takes the following basic form: "even accepting *arguendo* the plausibility of Concept X, which you cross-reference to extrapolate Theory A, Concept X actually entails Theory B."

For internal critique to succeed in posing a genuine challenge to a rival theory, it is vital that the critic adheres staunchly to that theory's premises, including its conceptual cross-references. If a purportedly internal critique strays from its target's premises, it will collapse into dissonant critique and will be susceptible to easy rejection on the basis that it proceeds at cross-purposes.[130]

[126]*Id.* at 1145.

[127]Fraser, *supra* note 123 at 101.

[128]*Id.* at 110–121. Finlayson argues that Theodore Adorno, a prominent immanent critic, draws similar conclusions in his later writing, albeit for different reasons (Finlayson, *supra* note 122 at 1157–1163).

[129]Fraser also argues that *societies* cannot be criticized for incoherence, since coherence is a virtue of agents, and societies are not agents (Fraser, *supra* note 123 at 105–110). This criticism doesn't apply either: Rule of Law theorists are agents who specifically embrace standards of coherence.

[130]The line between internal and dissonant critique may be less sharp in practice than this overview suggests. Sometimes a critic's interpretation of the content of a conceptual cross-reference might differ from the theorist's, such that it is unclear whether a seemingly internal critique is actually dissonant. This may occur when theorist and critic interpret the *same* source *differently*. Sometimes theorist and critic will use the

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Crucially, internal critical arguments recognize and as far as possible circumvent the deadlock-inducing impacts of conceptual cross-references. The claim I shall aim to substantiate in the next Section is as follows. Absent improbable resolution to the big debates in political theory and jurisprudence, internal critique is the most promising means for advancing debates over the Rule of Law: whether by problematizing existing theories, suggesting modifications thereto, or facilitating bridge-building between rival approaches.

IV. The Potential of Internal Critique

To demonstrate how internal critique works, how it can go awry, and—most importantly—to establish its potential to advance our understanding in deadlocked debates over the Rule of Law, it will be helpful to employ a case study. In this Section, we'll focus on T.R.S. Allan's account, which seems to operate both as a critique of thin theories and a defense of a thick theory of the Rule of Law.[131] Not only does Allan articulate one of the strongest defenses of a thick theory and a *prima facie* compelling internal critique of thin accounts, there are three pragmatic reasons for focusing on his account. First, it allows us to consider internal critique against both thin theories (in Allan's own, implicitly internal critique), and against Allan's thick theory, which helpfully invokes a very clearly articulated conceptual cross-reference. Second, it allows us to consider both how internal critique can go wrong, by collapsing into dissonance, and how it can go right, when it cleaves to its target's conceptual cross-references. Third, it demonstrates internal critique's radical potential: the arguments discussed below both recommend *total* revision or abandonment of the target theory, not mere fine-tuning.[132]

Now, a natural concern may arise whenever a general claim is substantiated by reference to a single case study. To assuage any doubts about generalizability, at the end of this section, I shall sketch some applications to other theories of the Rule of Law.

A. A (Purportedly) Internal Critique of Thin Theories

Thin theories take the Rule of Law to consist solely of core principles. The plausibility of this stance depends on core principles being justified, and coherently connected, by a value or point which does not imply the inclusion of any supplementary principles.[133] Allan's internal critique targets this stance, contending that even if we accept the premises of thin theories *arguendo*, theoretical coherence demands that supplementary principles are recognized as part of the Rule of Law.

According to Allan, the value or point of core principles identified in thin theories is their contribution to securing certainty and predictability in individuals' lives[134] and, more specifically, their contribution to securing individual freedom. He finds the

same term to pick out different concept(ion)s. *See, e.g.*, the text accompanying notes 168-71. And sometimes theorists don't precisely specify their conceptual cross-references, such that critics have no choice but to posit an interpretation, which might be rejected as misconstrued. *See, e.g.*, the text accompanying notes 172–77.

[131] I focus mainly on Allan, *supra* note 5, which refines and universalizes earlier work (*see supra*, note 24).

[132] Some will be less radical: *see infra*, Section IV.C.

[133] *See supra*, Section II.B.

[134] Allan, *supra* note 5 at 2016.

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latter claim to be explicit in Hayek's[135] thin theory of the Rule of Law and implicit in others.[136] The crux of Allan's critique is that, once the implications of freedom are fully understood, coherence demands the recognition of several supplementary principles which derive from precisely the same value.[137] Allan contends, in effect, that a theory which includes core principles *must* either endorse supplementary principles or embrace incoherence. And the critique is seemingly internal, since it claims to derive critical conclusions from the premises of its target theories.

For Allan, the conception of freedom which underpins the Rule of Law is the Kantian[138] "ideal of liberty"[139] as "independence."[140] Freedom means "independence from being constrained by another's choice"[141] and the principal threat to individual liberty is subjection to powers of "arbitrary interference – interference at the will or pleasure of other persons."[142] This Kantian conception of liberty "form[s] a bridge between formal and more substantive accounts of the rule of law."[143] According to Allan, liberty is "embedded"[144] within thin theories' justification of core principles, which serve to render individuals "better able to predict the incidence of governmental interference [and therefore able to] arrange her affairs in the manner best suited to her aims or interests."[145] When there are known, followable, and reliably enforced legal standards,[146] individuals enjoy "an inviolable domain of action,"[147] in which they can make plans and decisions. To the extent that core principles are violated, the determinacy that law provides—and which is essential for securing

[135]*Id.* at 205–206.

[136]*Id.* at 206. Specifically, in Fuller's enigmatic claim that law possesses intrinsic moral value (Fuller, *supra* note 2 at 96–97 and 162–163) combined with Simmonds' reconstruction of Fuller's theory (Simmonds, *supra* note 16).

[137]For Allan, this value also explains other intuitions, including the connection to law (Allan, *supra* note 5 at 201–203) and the opposition to arbitrary power (*id.* at 202).

[138]Allan's interpretation draws heavily on the defense of Kant's political philosophy in Arthur Ripstein, Force and Freedom: Kant's legal and political philosophy (2009), which in turn develops Kant's *Doctrine of Right* (Immanuel Kant, *The Metaphysics of Morals*, *in* Practical Philosophy 353, Part 1 (Mary Gregor ed. 1996)).

For Kant, the "universal principle of right" entails a single, "innate right" to freedom "insofar as it can coexist with the freedom of every other in accordance with a universal law" (Ripstein, *supra* at 13.). Freedom justifies the establishment of the state, law, and the requirements of legitimate government, ranging from matters of form and process to protection of substantive rights to property, status, and bodily integrity (*id.* at 13–29).

While Allan cites civic republicans as endorsing this conception of freedom, prominent republicans depart from Kant by embracing consequentialism (*see, e.g.*, Philip Pettit, Republicanism: A Theory of Freedom and Government (1997)) and/or narrow, value-pluralist and nonsubstantive conceptions of freedom (*see, e.g.*, Frank Lovett, A General Theory of Domination & Justice (2010)).

[139]Allan, *supra* note 5 at 203.

[140]*Id.* at 205.

[141]Ripstein, *supra* note 138 at 13.

[142]Allan, Sovereignty of Law, *supra* note 24 at 89.

[143]Allan, *supra* note 5 at 206.

[144]*Id.* at 208.

[145]*Id.* at 202.

[146]For Allan, certainty and predictability are not solely secured through legal rules: "the requirements of law may be knowable even if no rule if published in advance […] We may be able to rely on a grasp of […] settled practices and widely shared values" (*id.* at 207).

[147]*Id.* at 202.

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freedom—is undermined. Individuals become dependent in the sense that their choices, rights, and obligations are undermined by a pervading uncertainty and unpredictability. This starting point obviously resonates with the widespread thin theory view that core principles serve to secure certainty and predictability[148] and, on the face of it, the more specific view expressed by *some* thin theorists that certainty and predictability serve the value of freedom.

However, Allan argues that if the Rule of Law serves to secure liberty, it must be understood as extending beyond core principles. Once we perceive that the Rule of Law "is best understood […] as compliance with those conditions under which each person's freedom (or liberty) is secured,"[149] we find that it also justifies supplementary principles. First, to uphold liberty, law must treat "people equally in the sense that both departures from the general rule in particular cases and the divergent treatment of different groups of persons must be properly justified."[150] Second, liberty requires that legal systems secure the common good by upholding fundamental human rights.[151] On this Kantian approach, the common good does not equate to individual or collective interests. Instead, liberty requires protection of those "natural rights implicit in the basic idea of freedom"[152] including "all the familiar civil and political rights,"[153] to "conscience, speech, association, and personal liberty."[154] "Most" of the rights in the 1789 French Declaration of the Rights of Man and Citizen and the Universal Declaration are required by the Rule of Law, albeit that there is "scope for different interpretations."[155]

Since these requirements derive from liberty, supplementary principles—and a thick conception of the Rule of Law—are entailed by precisely the "same ideal"[156] which is supposedly invoked by thin theorists to justify core principles. Allan thus challenges the coherence of thinner accounts with a seemingly internal critique. Deductive closure requires that a theory incorporate all the logical ramifications of its premises unless there is good reason not to,[157] and according to Allan, nondiscrimination and protection of human rights are logically and inextricably entailed by the premises of thin theories. This argument would—if successful—demonstrate that thin theories are incoherent.

However, as above,[158] the productivity of any internal critique depends on its adherence to its target theories' premises. To the extent that it adheres to the conceptual cross-references of thin theories, Allan's critique will be internal, posing a meaningful challenge demanding a meaningful response, and therefore productive. To the extent that it deviates from its targets, however, this critique collapses into dissonance and unproductivity. As we have seen, Allan's critique invokes a Kantian conception of liberty. This conception of liberty is not (in itself) a central intuition

[148] *See supra*, the text accompanying notes 85–93.
[149] Allan, Sovereignty of Law *supra* note 24 at 89.
[150] Allan, *supra* note 5 at 207.
[151] Allan, Sovereignty of Law, *supra* note 24 at 93.
[152] *Id.* at 129.
[153] *Id.* at 114.
[154] Allan, *supra* note 5 at 204.
[155] *Id.* at 209.
[156] *Id.* at 203.
[157] *See supra*, Section I.B.
[158] *See supra*, Section III.B.

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about the Rule of Law. Instead, it is a distinct concept, cross-referenced to help rationalize central intuitions about the Rule of Law. The internality or dissonance of Allan's critique thus turns on the extent to which the thin theories it targets are—or implicitly must be—premised on that same conceptual cross-reference.

To begin with, sweeping[159] conclusions about the incoherence of thin theories *in general* cannot be sustained by this critique, absent a compelling argument that Kantian political theory is uniquely correct. As regards many—perhaps most—thin accounts of the Rule of Law, the above argument registers dissonantly. First, thin theories which plausibly cross-reference concepts other than freedom—agency[160] or dignity[161], say—are not obviously imperiled by a critique premised on the notion that the scope of the Rule of Law is determined by the requirements of Kantian freedom. The critique says, in effect: "if your theory cross-referenced Concept X (Kantian freedom) instead of Concept Y (agency, dignity, etc.), it would have reached different conclusions." But as long as invoking Concept Y is plausible, the argument registers dissonantly and is destined to deadlock-reproducing unproductivity.

Second, Allan's critique also registers dissonantly in relation to some thin theories which expressly cross-reference the concept of freedom in their rationalization of core principles. Cross-references to the *concept* of freedom need not be cross-references to a specifically Kantian *conception* of freedom. It is plausible to advance a narrower, non-Kantian conception of freedom as independence or nondomination. For example, Frank Lovett premises a thin account of the Rule of Law[162] on a narrow, procedural conception of freedom[163] as nondomination[164] under which freedom is one value in a pluralist political theory, secured solely by subjecting power to effective constraints.[165] Assuming this narrow, non-Kantian conception of freedom is plausible, Allan's critique again registers dissonantly.

It follows from these observations that internal critique will generally be more modest, perhaps even idiographic, eschewing grand claims to have established the implausibility of *all* rival theories. A specific critique may be genuinely internal in relation to *some* thin or *some* thick theories, but probably not all.

Allan's best—indeed only—claim to be prosecuting a genuinely internal critique relates to those thin theories which can plausibly be read as deriving from a specifically Kantian conception of freedom. Among those Allan cites, Friedrich Hayek's and Nigel Simmonds' theories are the most likely candidates. Both Hayek[166] and Simmonds[167] endorse a conception of freedom as independence, contrasting the liberty of the free person with the domination of slaves. Yet, according to Allan, both mistakenly derive thin conceptions of the Rule of Law.

[159] *See supra*, the text accompanying notes 6–11.

[160] *See, e.g.*, Fuller, *supra* note 2; Waldron expressly rejects the view that freedom underpins the concept (Waldron, *supra* note 3 at 59–60).

[161] *See, e.g.*, Raz, *supra* note 2; Fuller *supra* note 2.

[162] Frank Lovett, A Republic of Law (2016).

[163] For tentative endorsement of the notion that freedom is nondomination, *see* Lovett, *supra* note 138 at 151–6.

[164] Allan uses "non-domination" interchangeably with "independence" (Allan, *supra* note 5 at 205).

[165] On the concept of nondomination, *see* Lovett, *supra* note 138 at 25–123; on its place in a pluralist political theory, *see id.* at 140–147.

[166] Friedrich Hayek, The Constitution of Liberty Ch. 1 (Routledge, 1960).

[167] Simmonds, *supra* note 16 at 101–104. If Simmonds is right that to make sense of Fuller's theory, we must invoke this conception of liberty, Allan's argument may equally apply to Fuller.

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If these theories cross-reference Kantian freedom, Allan's critique is internal. It registers like this: "you (Hayek and Simmonds) say a thin conception of the Rule of Law can be derived from central intuitions rationalized in line with a conceptual cross-reference to Kantian freedom, but if you had followed the logic of your premises, you would have endorsed a thick conception."

It may be possible to quibble over whether Hayek and Simmonds do endorse this specific Kantian conception of freedom.[168] While both define freedom as independence, it is at least arguable that they both have a thinner, non-Kantian conception in mind. Simmonds, for instance, contends that freedom is secured simply by establishing defined areas of optional conduct,[169] that these benefits accrue irrespective of whether the law's objectives are "good or bad,"[170] and that "[l]egality and justice are distinct concepts and values."[171] All these claims conflict with Allan's monist, Kantian conception of freedom. The critique may register dissonantly in relation to Simmonds, too, boiling down to the observation that his theory of the Rule of Law might have been thicker, had he endorsed a thicker conception of freedom.

Hayek's philosophical outlook is more avowedly Kantian.[172] But even so, it may be possible to dispute the notion that his theory of the Rule of Law derives from the conception of freedom in Kant's political theory. Although Hayek does invoke freedom as independence, his references to Kant in respect of the Rule of Law generally refer to Kant's distinct moral philosophy,[173] emphasizing connections between the Rule of Law's preference for general legal standards and the universalizability which defines Kant's categorical imperative. Elsewhere, Hayek's views on securing liberty possess a distinctly consequentialist character[174] that is alien to Kantian political theory.[175] Others have argued that a distinctive "market republican" conception of freedom underpins Hayek's theory of the Rule of Law.[176] There may thus be scope to dispute the internality of Allan's critique even of Hayek, the theorist to whom it most clearly seems to apply.

I shall not analyze in detail the extent to which these theories do (or implicitly must) commit to a Kantian conception of freedom. Instead, I shall suggest alternative conclusions. On the one hand, if the best reading of Simmonds and Hayek's theories of the Rule of Law entails that they are not premised on a Kantian conception of freedom, then Allan's purported critique is wholly dissonant and—*qua* critique—largely unproductive.[177] More generally, for internal critique to avoid this collapse

[168]Interpretative issues like this illustrate how the line between dissonant and internal critique can be fuzzy in practice (*see supra*, note 130). This fuzziness can be reduced by theorists and critics precisely articulating their conceptual cross-references.

[169]Simmonds, *supra* note 16 at 104.

[170]*Id.* at 102.

[171]*Id.* at 198.

[172]John Gray, Hayek on Liberty Ch. 1 (3rd ed. 1998).

[173]For example, see: Hayek, *supra* note 166 at 196–197. On the distinction between Kant's ethics and political philosophy, and the tendency for the latter to be overlooked, *see* Ripstein, *supra* note 138 at *ix* and 6–13.

[174]Andrew Gamble, *Hayek and Liberty*, 25 Crit. Rev. 342 (2013).

[175]Ripstein, *supra* note 138.

[176]Sean Irving, Hayek's Market Republicanism: The Limits of Liberty (2020).

[177]Although it wouldn't deliver its *intended* contribution, it might contribute modestly by forcing clarification of its target theory. *See supra*, the text accompanying notes 118–119.

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into dissonance, it is important to rigorously establish that the premises of the critique are in fact shared by the target theory.

On the other hand, if Allan's critique *is* internal with regard to Hayek and Simmonds, it follows that it may productively advance debates over the Rule of Law. It may turn out that the best—or only—possible rationalization of central intuitions about the Rule of Law, in conjunction with a cross-reference to a Kantian conception of freedom, yields a thick theory. But that remains to be seen. Internal *critique* will often prompt an internal *debate* over how to understand a concept, assuming shared premises. Indeed, as I shall argue next, it is arguable that a thin theory is plausible or preferable, even assuming Kantian freedom as a premise.

B. An Internal Critique of a Kantian Thick Theory

The above discussion of Allan's critique is not the end of the story. First, even if Allan's argument—*qua* critique of thin theories—is wholly dissonant, it still serves as an exercise in (thick) theory-construction against which we might prosecute an internal critique of our own. Second, if Allan's critique does register internally in relation to *some* theories, it merely establishes an internal debate over how to theorize the Rule of Law on the basis of a cross-reference to Kantian freedom. Either way, we can apply the methodology of internal critique to Allan's positive claims about the extrapolation of a thick theory of the Rule of Law from a cross-reference to Kantian freedom.

Construed as an exercise in theory-construction, Allan contends that the certainty and predictability secured by core principles are but one requirement of a Kantian conception of freedom. That being so, core Rule of Law principles are inextricably connected to various other requirements of Kantian freedom: specifically, nondiscrimination and fundamental rights. That inextricable connection points toward a thick theory of the Rule of Law. Since core principles are justified as part of the Rule of Law due to their contribution to securing freedom, deductive closure suggests that the other requirements of that value, including nondiscrimination and human rights, should *pro tanto* be recognized as part of the Rule of Law alongside core principles.[178]

Accepting the cross-reference to the Kantian conception of freedom *arguendo*—as we must in internal critique—the logic of the argument seems superficially compelling. While deductive closure may be spurned to avoid profoundly counter-intuitive conclusions—that the Rule of Law requires government through *ad hoc* commands, say—that caveat does not seem to apply to what is, on Allan's account, a typical thick theory. It is not plausible to argue that nondiscrimination and human rights are straightforwardly ruled-out as principles of the Rule of Law by central intuitions, any more than it is to argue that those principles are intuitively essential to the concept, because there is no sufficiently widely shared view of *exactly* how broad the Rule of Law is. Of course, that isn't to say that the plausible breadth of Rule of Law theories is wholly unconstrained: central intuitions suggest that conceptions which are extremely broad or narrow, well outside the range of ongoing debates, are *pro tanto* mistaken.

Despite the superficial plausibility of Allan's extrapolation, closer examination reveals scope for a compelling internal critique. To begin with, the substantive

[178] *See supra*, Section I.B.

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implications of Kantian freedom are far wider than those plausibly recognized as requirements of the Rule of Law, even under typical thick theories. For Arthur Ripstein, whose defense of Kantian freedom underpins Allan's account,[179] freedom does entail typical supplementary principles including an austere conception of equality[180] and protection of civil and political rights.[181] But the requirements of freedom extend much further than these relatively plausible Rule of Law principles. Kantian freedom additionally requires, *inter alia*, the establishment of public rights of way,[182] protection of public health,[183] provision for national security,[184] establishment of representative government,[185] unassailable property rights,[186] and laws prohibiting public begging[187] and solicitation.[188] It also entails that it is straightforwardly illegitimate for states to act specifically for the purposes of reducing harm, promoting individual interests, or improving material equality.[189] These various requirements and prohibitions all derive equally and inextricably from Kant's monist and absolutist understanding of freedom.

A complete picture of the requirements of Kantian freedom helps formulate an internal critique of Allan's thick theory. As we saw above,[190] Allan contends, in effect, that deductive closure requires that the various ramifications of Kantian freedom must be recognized as principles of the Rule of Law. But we can turn the tables. If we pursue Allan's logic to a deductive closure of its own, the Rule of Law would have to include every requirement of Kantian freedom, from rights of way to prohibitions on public begging and solicitation, to an absolute prohibition on state action directly pursuing material equality. If derivation from the value underpinning core principles justifies the inclusion of *some* of these requirements as supplementary principles, it *pro tanto* justifies the inclusion of *all.* Yet whereas the argument from deductive closure possessed a superficial plausibility when it seemed merely to entail commonly endorsed supplementary principles such as nondiscrimination and human rights, that superficial plausibility is shattered once the range of supplementary principles extends to encompass *all* the requirements of Kantian freedom. While a state which fails to prohibit solicitation or provide adequate public rights of way might be criticized, that criticism seems bizarre if articulated as a failure to uphold the Rule of Law. So, even accepting *arguendo* that Kantian freedom encapsulates the requirements of a legitimate state, it is far from obvious that all its demands should be understood as requirements of the Rule of Law. An unmodified Kantian approach leads to wildly counterintuitive conclusions about the concept's breadth.

Kantian thick theorists have at least three possible responses to this challenge. First, they could dig in, contending that the Rule of Law does incorporate every

[179]For an overview, *see supra*, note 138.
[180]Ripstein, *supra* note 138 at Ch. 9.
[181]*Id.* at 209.
[182]*Id.* at 248–256.
[183]*Id.* at 259–261.
[184]*Id.* at 259–261.
[185]*Id.* at Ch. 7.
[186]*Id.* at Chs. 2–4.
[187]*Id.* at 261–265.
[188]*Id.* at 261.
[189]*Id.* at Ch. 9. It should however be noted that some egalitarian measures can be reconstructed as requirements of freedom.
[190]*See supra*, Section IV.A.

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ramification of Kantian freedom and therefore central intuitions about the breadth of the Rule of Law are mistaken. The difficulty with this response is that departures from central intuitions would be extensive, expanding the scope of the Rule of Law well beyond even the thickest of typical thick theories. Indeed, this approach unequivocally makes the Rule of Law coextensive with the requirements of a legitimate state; it is "a complete social philosophy,"[191] a characteristic which detracts not only from its intuitive plausibility but also its practical utility as an evaluative concept.[192] Moreover, this stance seemingly entails that *all* political concepts deriving from the value of freedom should have precisely the same, all-encompassing content. If the Rule of Law includes *everything* which cumulatively serves to secure freedom, it is difficult to see why other concepts which Kantians take to serve the value of freedom—democracy, separation of powers, and so on—should not also extend to that scope. While departures from intuitions can be justified in conceptual analysis, in this case the burden of justification is high: radical conceptual bloating must be shown to be preferable, especially when there is a plausible alternative (outlined below).

A second possible response contends that Ripstein's account of the scope of Kantian freedom is mistaken. If the requirements of freedom were limited to things which are plausibly part of the Rule of Law—core principles, nondiscrimination, and human rights protection, for instance—it would be more plausible to maintain that the Rule of Law incorporates all such requirements. But it is difficult to see how an interpretation of Kantian freedom could be substantially narrower than Ripstein's without fatally undermining Kantian political theory. Under the monist, Kantian approach, freedom is the sole source of political legitimacy: freedom *alone* delineates the scope and constraints on legitimate state action.[193] Without abandoning this central plank of Kantian political thought, a narrower understanding of freedom would entail an implausibly narrow view of the scope of legitimate state action.

The third response concedes that the Rule of Law does not incorporate every implication of Kantian freedom, but instead corresponds to some subdivision of that ideal. This idea is not alien to Kantian political theory, since Kantians do articulate subdivisions of the requirements of freedom, both at a high level—between private and public right—and by describing specific concepts—separation of powers, representative government, property rights, and so on—as distinct, albeit connected requirements of freedom.[194] However, if some subdivision is recognized as essential, the seeming inevitability of Kantian premises yielding a thick theory of the Rule of Law dissipates. Since we must exclude at least *some* of what is required by Kantian freedom from the scope of the concept, it is conceivable that the requirements we exclude will not be limited to those things which are egregiously counterintuitive. In other words, we might conclude that it is most coherent to limit a Kantian conception of the Rule of Law to core principles, thus constructing a thin conception from Kantian foundations. Whether the resultant theory is thin or thick, the challenge is to articulate a principled and coherent basis for subdivision; some rational grounds for distinguishing those requirements of Kantian freedom which form part of the Rule of Law from those which do not. The crucial question is how—if at all—the scope of the

[191]Raz, *supra* note 2 at 211.

[192]This modest commitment to "pluralism" is shared by thin and thick theorists (Tasioulas, *supra* note 1 at 119).

[193]Ripstein, *supra* note 138 at 5.

[194]*Id.*

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concept can be coherently restricted to a plausible breadth *within* a Kantian political-theoretical framework.

Let's begin by assessing the prospects of justifying a typical thick theory under this approach. The specific challenge is to articulate a principled basis for collecting core and plausible supplementary principles under the umbrella of the Rule of Law, while excluding the other, less plausible requirements of Kantian freedom. As we have seen, it is not sufficient merely to show that plausible supplementary principles are required by Kantian freedom, since that argument opens the floodgates to less plausible principles and a conception of implausible breadth. It will not be straightforward for Kantians to justify the inclusion of plausible supplementary principles while excluding the myriad other requirements of freedom. First, it is not feasible to invoke any intuition in favor of including only the *most plausible* supplementary principles, since opponents can respond by pointing out that intuitions about the specific breadth of the Rule of Law are noncentral, so cannot be decisive. Second, thick theorists cannot contend that the Rule of Law covers only the *most fundamental* or *most freedom-enhancing* requirements since, under Kant's monist approach, not only is freedom the *only* political value but all the requirements of freedom are *equally* fundamental and absolute.[195] Judgments about which requirements of freedom matter most would require a thoroughly un-Kantian ranking of harms. Third, Kantians cannot contend that Rule of Law principles are unique insofar as they are distinctively central to the legal system or can only be secured through law, since other requirements of Kantian freedom, including rights of way, restrictions on begging and solicitation, and the establishment of representative government, can similarly be secured only through law.[196] None of these options will succeed, then. Of course, some other rationale for isolating a thick conception of the Rule of Law on Kantian grounds might be found, but it is not obvious how it would do so.

Can a thin theory of the Rule of Law be derived coherently from Kantian foundations? We might contend that, while core and supplementary principles are all requirements of the right to freedom, they nevertheless protect freedom in different *ways*.[197] In short, core principles primarily concern the manner or form through which freedom is protected, whereas supplementary principles concern the areas of individual freedom which must be secured. This distinction is commonplace in thin theories, but it is also latent in Allan's account of the connections between the different types of Rule of Law principles and freedom.[198] For Allan, core principles protect individuals from arbitrariness—and consequent diminution of individual freedom—by ensuring that systems of government do not create uncertainty and unpredictability through unfollowable or unreliably enforced laws.[199] Nondiscrimination and human rights, by contrast, do not primarily secure freedom by rendering individuals' lives more certain and predictable, but by protecting them against unjustifiable interference, thereby protecting individuals' powers of self-determination over bodily integrity, property, and status.[200] While the justification for core and supplementary

[195] *Id.*

[196] Moreover, *every* requirement of freedom obliges the state to enact relevant law(s) (*id.*).

[197] This argument resembles some existing arguments. *See, e.g.*, JOHN GARDNER, LAW AS A LEAP OF FAITH, Ch. 8 (2012). Unlike those arguments, mine is a self-consciously internal critique from Kantian premises.

[198] *See supra*, Section IV.A.

[199] Allan, *supra* note 5 at 207.

[200] RIPSTEIN, *supra* note 138. The wider requirements of Kantian freedom (e.g., rights of way, bans on begging, etc.) resemble nondiscrimination and human rights since they identify specific legal protections

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principles alike can ultimately be traced to freedom, the manner in which different principles protect freedom is distinctive. This distinction thus arguably grounds a coherent subdivision of the requirements of Kantian freedom, which would regard core principles as uniquely relevant to the Rule of Law. This thin conception of the Rule of Law and other concepts required by Kantian freedom would stand in "complex unity."[201] Each is distinct, but derives from and contributes to the same fundamental value.

This internal critique suggests that even (Kantian) value-monists have good reasons to be conceptual-pluralists. While Kantians would still trace the justification of distinct normative political concepts to a single overarching value, it is both possible and necessary to distinguish those concepts by the manner in which they secure or promote that value. It is possible, therefore, to justify a thin theory of the Rule of Law by drawing a distinction *internal* to the Kantian framework. There may be scope to dispute this subdivision of freedom and the thin theory of the Rule of Law it yields,[202] but Kantian thick theorists must meet that challenge directly. Crucially, whatever further interventions this critique provokes, those debates should take place within a fully *internal* framework. To the extent that they do so, these debates will involve meaningful and productive engagement between rival positions.

C. Generalizing Internal Critique

Even if you're with me so far, you might be wondering how well internal critique generalizes to other theories. I have shown how it might work in one case, but my initial claim was that internal critique is a *generally* productive methodology. To go some way toward substantiating that broader claim, I shall now sketch how internal critiques might be formulated against other prominent theories of the Rule of Law; theories specifically premised on cross-references to specific conceptions of law. Needless to say, these sketches are not fully developed arguments, but they support the *prima facie* plausibility of my claim about generalizability.

First, an expansionary critique of thin theories premised on a conception of law as distinctive form of governance through rules.[203] Some thin theorists claim that law's essential, formal properties map onto core principles, which in turn promote certainty and predictability and explain the concept's value.[204] It might be contended, however, that even law which possesses those formal properties is insufficient to adequately promote certainty and predictability; that for law to be predictable in complex modern legal systems it must also be *substantively consistent*.[205] Since legal

which are necessary to secure independence, rather than specifying the manner and form through which those provisions should be established and enforced.

[201]Rainer Forst, *The Constitution of Justification: Replies and Comments*, *in* Constitutionalism Justified: Rainer Forst in Discourse 295, 340 (Ester Herlin-Karnell, et al. eds., 2019).

[202]Perhaps the manner and form/substance distinction is unsustainable. *See, e.g.*, Michael P. Foran, *The Rule of Good Law: Form, Substance and Fundamental Rights*, 78 Cambridge L.J. 570 (2019).

[203]This definition captures most versions of legal positivism, Fuller's "procedural" natural law (Fuller, *supra* note 2 at 96), and Raz's "lay" conception (Raz, *supra* note 2 at 213).

[204]*See, e.g.*, the lists in Fuller, *supra* note 2; Raz, *supra* note 2.

[205]Substantive consistency goes beyond the core principle of logical noncontradiction outlined by Fuller, *supra* note 2 at 36.

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subjects cannot internalize every legal rule,[206] the followability of law sometimes depends on the law's content tessellating such that we can reliably predict what it requires, even when we are ignorant of the specific rules. If so, the principle of deductive closure points toward the Rule of Law, requiring substantive consistency in addition to the formal characteristics derived directly from the theorist's conception of law. And in liberal democracies, substantive consistency *practically* requires law which consistently upholds liberal-democratic values including nondiscrimination and human rights. Although this critique takes us *beyond* the essential properties of law according to the cross-referenced conceptions of law, it can be sustained without *abandoning* those conceptions. We need not endorse the claim that legal validity is predicated on substantive moral merit,[207] since substantively *unjust* law can nevertheless be substantively *consistent*. Nor need we even endorse the proposition that legal validity depends on (amoral) substantive consistency, as long as we accept that valid law may nevertheless fail fully to comply with the Rule of Law. This critique is therefore internal: it suggests that deductive closure demands a modest expansion of some thin theories, without departing from their conceptual cross-references.[208]

Second, take Dworkin, for whom the Rule of Law requires respect for rights, because rights are intrinsic to law.[209] This theory combines the intuition that the Rule of Law is connected to the concept of law with a conceptual cross-reference to a rights-based conception of law. Internal critique cannot problematize either of these premises, lest it collapse into implausibility or dissonance, respectively. But we might plausibly—and internally—problematize the implicit understanding of the nature of the connection between the concept of law and the Rule of Law. Dworkin's theory assumes a *symmetrical* connection: everything which is part of the former is part of the latter. But perhaps we should prefer an *asymmetrical* connection: regarding the Rule of Law as picking out only some features of law, since a conception of the Rule of Law containing every substantive implication of Dworkin's conception of law risks being counterintuitively broad.[210] The plausibility of this critique is burnished by the fact that it advocates for a position adopted by some other nonpositivists, for whom the Rule of Law captures a distinct subset of the broad and varied moral contributions law secures.[211] And, crucially, it is *not* premised on the rejection of Dworkin's conceptual cross-references, but targets the coherence and plausibility of the extrapolation: it is internal.

These sketches point to ways in which internal critique might generalize. In both cases, the critique problematizes an arguably unjustified assumption that one's theory of the Rule of Law should symmetrically reflect one's cross-referenced conception of law[212]—in the first case by arguing that coherence requires the Rule of Law to go *beyond* the cross-referenced conception of law, while remaining faithful to it; in the second case by arguing that intuitive plausibility might provide reasons to understand

[206]Chiao, *supra* note 77.

[207]John Gardner, *Legal Positivism: 51/2 Myths*, 46 Am. J. Juris. 199 (2001).

[208]The revisionary conclusion of this critique is a bit more modest than that in Section IV.B, since it does not require thin theories to endorse any specific substantive principles in the abstract. But internal critique need not have a uniformly radical impact to be productive.

[209]Dworkin, *supra* note 1.

[210]This critique thus relies on a similar logic to that advanced *supra*, Section IV.B.

[211]*See, e.g.*, Finnis, *supra* note 77 at 270–276.

[212]For a range of views *see supra*, Section II.B, especially note 77.

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the Rule of Law more *narrowly* than the cross-referenced conception of law. Nothing turns on the likelihood of these arguments persuading proponents of these theories to change their minds: as with the critique of Allan's Kantian theory, what matters is that the arguments contribute to our understanding by presenting meaningful challenges; challenges which proponents of these theories *should* take seriously. I think these critiques satisfy that burden: assuming they are superficially plausible, they should stimulate a more sophisticated and *internal* debate over the best way to conceive the connection between the concept and the Rule of Law. That would count as philosophical progress.

V. Conclusion

Owing to the indeterminacy of our starting points and the necessity of conceptual cross-references, deadlock is the virtually inevitable outcome of conceptual analysis of the Rule of Law. Moreover, no amount of ingenuity in theory-construction or theoretical critique is likely entirely to transcend it.

However, reflection on the methodology of theory-construction and critique yields more optimistic conclusions about how to pursue philosophical progress. In terms of theory-construction, the seemingly bleak conclusion that deadlock is inevitable reveals important facts about these debates. Most obviously, it explains the frustrating stagnancy of current debates, by identifying the precise causes of deadlock and explaining why they are unavoidable. In turn, this understanding points to subtle shifts in the way arguments in theory-construction should be understood as conditional upon a specific set of controversial conceptual cross-references.

Properly understanding the impact of conceptual cross-references yields further benefits in the realm of critique. First, understanding the impact of conceptual cross-references explains why dissonant critique is almost inevitably *un*productive. Second, it reveals opportunities for innovation by focusing our efforts on a critical methodology—internal critique—with greater productive potential. By cleaving rigorously to a rival theory's defensible conceptual cross-references, we avoid the trap of prosecuting critical arguments that speak at cross-purposes to their target. Since internal critique cannot be dismissed for proceeding from different premises, it can genuinely problematize rival theories.

The frameworks articulated in this article should, therefore, have benefits which extend beyond my specific claims. For one, even when plausible responses to internal critiques are available, the fact that internal critique poses meaningful challenges and forces meaningful responses makes it a highly attractive option for strengthening and deepening our understanding of rival theories of the Rule of Law. Second, internal critique may create opportunities for bridge-building between theories. While internal critique will rarely vanquish its target(s), it can reveal how different theoretical traditions might sometimes reach similar views on discrete elements of their overall political philosophy. One conclusion we might draw from the internal critique of Allan's theory is that both Kantians and non-Kantians can plausibly alight on overlapping, thin conceptions of the Rule of Law. While acknowledging that the foundations of those theories differ, we can identify similarities with regard to the shape of specific concepts.

In short, deadlock should not lead us to abandon the Rule of Law theory altogether, nor should we cease to debate and critique rival theories. Instead, we

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should be more alert to the features of the theoretical terrain which cause deadlock and self-consciously pursue methodological approaches which recognize and respond to it.

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